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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In Re:
WAL-MART Wage and Hour
Employment Practices Litigation

THIS DOCUMENT RELATES TO:
All Cases.

MDL - 1735

02:06-cv-225 PMP (PAL)

**APPELLANTS JESSICA GAONA,
STEPHANIE SWIFT, DEBORAH
MADDOX AND FATIMA
ANDREWS' JOINT RESPONSE TO
WAL-MART'S MOTION FOR BOND
FOR APPEAL
(C.R. # 539)**

COME NOW Objectors JESSICA GAONA, by and through her counsel, Lisa A.
Rasmussen, Esq., and Christopher A. Bandas, Esq.; STEPHANIE SWIFT, by and through

Response

her counsel, Edward W. Cochran, Esq.; DEBORAH MADDOX, by and through her counsel, Edward F. Siegel Esq.; and FATIMA ANDREWS, by and through her counsel, John Pentz, Esq., and hereby submit their Joint Response to Wal-Mart's Motion for Bond For Appeal and its related document docket number 539.

RESPONSE IN OPPOSITION TO WAL-MART'S MOTION

Wal-Mart seeks an appeal bond under Rule 7 FRAP. Specifically, it states, "Wal-Mart believes the amount of the appeal bond requested by Plaintiffs in their motion to request objectors to post appeal bond is appropriate." (Wal-Mart's Motion at p. 4). This, this response in opposition will simply repeat the arguments in opposition to Class Plaintiffs. As explained in Response to Class Plaintiffs' Motion for Bond, \$715,000 or \$990,000 sought by class counsel are not for costs. Class Plaintiffs' claimed bond costs items are not bondable on appeal under the facts of this case. Under Rule 7 FRAP, a bond cannot include attorneys' fees or administrative costs. Objectors/Appellants' objections to the settlement and Class Counsel's attorneys' fees, and their appeal from the order overruling their objections to the settlement and class counsel's fees, are facially not frivolous and their appeal is highly unlikely to be declared so by the appellate panel.

It is clear that Class Counsel is seeking a \$715,000 or \$990,000 bond in an attempt to stifle objectors' appeal from this court's approval of the settlement and their attorneys' fees. That is not a proper use of the rules relating to bonding, and the Court should not allow it pursuant to Rule 7 FRAP. Class Plaintiffs' are entitled to a bond for the actual costs explicitly taxable pursuant to in Rule 39 FRAP, but not anything more.

A. Neither the Objections to Attorney Fees Nor the Appeals Are Frivolous

The overarching theme of Class Plaintiffs' request for \$715,000 or \$990,00 bond in this case is that Objectors/Appellants' objection to the settlement and class counsel's fees are frivolous, and that Objectors/Appellants counsel are "professional objectors"¹ who pursue objections for improper purposes.

¹ Although class counsel may prefer pro se objectors, or objectors counsel with no experience in class actions, due process, assures objectors the right to professional representation.

1 First, an appeal is frivolous if "the result is obvious or if the claims of error are wholly without
2 merit." *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). The fact that
3 there is a body of federal jurisprudence regarding attorney's fees shows reasonable people often differ
4 on this issue. 28 U.S.C. Section 1927, which might support a bond for "vexatious litigation conduct,"
5 is inapplicable to this appeal as it requires "bad faith or intentional misconduct by counsel." Although
6 the imposition of attorney's fees on appeal as a sanction is allowed under Rule 38, it is only available
7 after the appeals court finds the appeal frivolous, and only upon further motion and hearing. 10 Wright,
8 Miller & Kane, Federal Practice & Procedure, §2675; 2675.2 (2001); see also *Azizian v. Federated*
9 *Department Stores, Inc.*, 499 F.3d 950, 960 (9th Cir. 2007).

10 It is well established that whether an appeal is frivolous is solely within the purview of the
11 appellate court, not the district court. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295, 299
12 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 407 (1990); *In re American President*
13 *Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir 1985). Only the appellate court has the authority to impose
14 sanctions for a frivolous appeal, *Aizian*, 499 F.3d at 960; *In re Vasseli*, 5 F.3d 351, 353 (9th Cir 1993)
15 citing *In re American President Lines, Inc.* 779 F.2d 714, 717 (D.C. Cir. 1985).

16 In the case of *Azizian v. Federated Department Stores, Inc.*, the 9th Circuit considered the
17 question of under what circumstances a district court may require an appellant to include appellate
18 attorney's fees in an appeal bond. See *Azizian*, 499 F.3d 950. The *Azizian* court determined that a
19 district court may require an appellant to secure appellate attorney's fees in the appeal bond pursuant
20 to Rule 7 only if an applicable fee shifting statute includes attorney's fees in its definition of recoverable
21 costs. *Id.* at 953. In *Azizian*, the district court had ordered appellants to post a \$42,000 appeal bond,
22 representing \$2,000 in appellate costs under Rule 39 and \$40,000 in appellate attorney's fees. *Id.* at 954.
23 the district court rationalized its inclusion of attorneys fees in the appeal bond by concluding that the
24 Court of Appeal was likely to find the appeal frivolous. *Id.* Appellants tendered the \$2,000 of the bond
25 allocated to costs under Rule 39, but not the \$40,000 allocated to attorney's fees. *Id.* The 9th Circuit
26 eventually found that the appeal should not be dismissed on the merits because appellants had failed
27 to post the full bond required by the district court. *Id.* at 954. In discussing the district court's
28 determination that the Court of Appeal would find the appeal frivolous and therefore award attorney's

1 fees as a sanction under Rule 38, the 9th Circuit stated that "even if we were to conclude that [the
2 appellant's] appeal was frivolous, however, we would reverse the district court's inclusion of appellate
3 attorney's fees on that basis." *Id.* at 960. The 9th Circuit held that the district court's inclusion of
4 attorney's fees in the bond on the grounds that the appeal was likely frivolous was improper for three
5 reasons. *Id.* First, because an award of attorney's fees for a frivolous appeal under Rule 38 is very
6 unusual, and it would be difficult for the district court to gauge whether such an award would be likely.
7 *Id.* Second, if the potentially large sums possible under Rule 38 were included in Rule 7 bonds, the
8 effect would be to chill appeals. *Id.* Third, Rule 38 authorizes the award of attorney's fees as a sanction
9 for improper conduct on appeal, and only the court of appeals may order the sanction of appellate
10 attorney's fees. *Id.* The 9th Circuit concluded that "whether, or how, to deter frivolous appeals is best
11 left to the courts of appeals..." *Id.* at 961. Therefore, there is simply no provision for a district court to
12 make an advance determination that an appeal violates Rule 38, much less authority for imposing a
13 bond to include the anticipated damages and sanctions that the circuit court may ultimately determine.

14 **B. Bondable Costs Do Not Include Attorneys' Fees**

15 Apart from their claim that frivolity of the appeal supports a bond for attorneys' fees, Class
16 Plaintiffs suggests that this Court has the authority to include prospective attorneys' fees as items of
17 Rule 7 FRAP costs. In fact, the majority rule among circuit courts, endorsed by the Second, Sixth,
18 Ninth and Eleventh Circuits, is that a district court may include attorneys' fees in a Rule 7 Bond, but
19 **only if** those attorney's fees would be considered recoverable costs under an applicable fee shifting
20 statute. See *Azizian*, 499 F.3d at 958.

21 This Court now has the opportunity to clarify and update its rule regarding Rule 7 bond orders
22 issued by district courts to bring it in line with the majority view: that attorney's fees may only be
23 included in a Rule 7 bond if the underlying "prevailing party" fee shifting provision of a statute includes
24 attorney's fees as recoverable. This Court also has the opportunity to firmly establish appellate court
25 precedence in the determination of whether an appeal is frivolous, in concert with at least three other
26 circuits by holding that the appellate courts are the best forum in which to determine whether an appeal
27 is frivolous, and that district courts have no authority to make peremptory determinations of
28

1 frivolousness, nor to base bond orders on those predictions. *See Azizian*, 499 F.3d at 960 (9th Cir.
2 2007).

3
4 **CONCLUSION**

5 As set forth above, there is no legal or factual support for the imposition of a Rule 7 bond that
6 exceeds the actual costs and it is respectfully requested that this Court issue an Order denying Plaintiff
7 Nancy Hall's Motion, or, in the alternative, limiting any bond that this Court will consider to only the
8 actual costs as set forth herein.

9 Respectfully submitted and dated this 8th day of January, 2010.

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11 */s/ Lisa A. Rasmussen*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellants' Jessica Lynn Gaona, Stephanie Swift, Deborah Maddox and Fatima Andrews Joint Response to Plaintiffs' Motion for Bond has been served via CM/ECF upon the following persons, on this 8th day of January, 2010:

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